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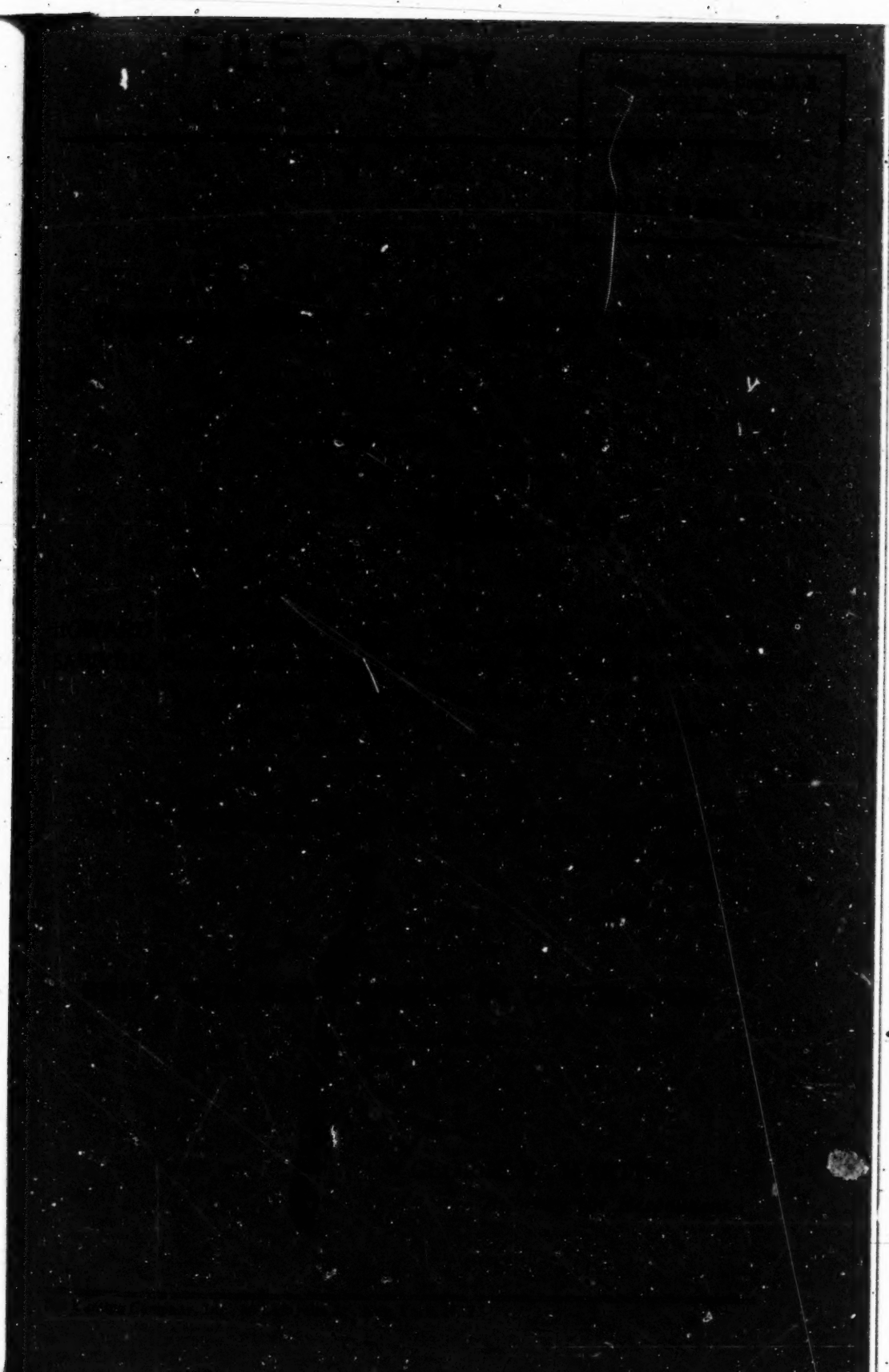

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

AGAINST

CONNECTICUT RAILWAY AND LIGHTING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals (Patterson, *J.*) is reported in 109 Fed. (2nd) 568.

Jurisdiction.

Jurisdiction to issue the writ is vested in this Court by Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Question Presented.

Is the evidence in the record sufficient to sustain the allowance of the landlord's claim in bankruptcy for damages by reason of the rejection of its lease?

Statement.

Respondent was landlord, and the New Haven Railroad was tenant, under a 999-year lease of trolley properties. The New Haven went into bankruptcy, under Sec. 77 of the Bankruptcy Act; and its Trustees rejected the lease, which then had 969 years still to run.

Respondent filed a claim for damages arising from the rejection of its lease, and was allowed $1,263,412.92 as damages for the period from rejection (December 18, 1935) to hearing on the claim (June 30, 1937). For any period after final hearing the District Court allowed nothing, saying the statute ["the actual damage or injury determined in accordance with principles obtaining in equity proceedings"] meant that only damages accrued without acceleration at the date of hearing could be proved.

This disposition was affirmed by the Circuit Court of Appeals (95 Fed. (2nd) 483).

It was reversed by the Supreme Court (305 U. S. 493), which held that if claims for rent to accrue under a lease are to be discharged they must be made provable, for they cannot be destroyed (299 U. S. 439). The case was then remanded to the District Court for further proceedings in accordance with the opinion.

At the hearing (March 13, 1939) all the witnesses were called by Respondent. The New Haven called none. There was no conflicting testimony. There was no question involving the credibility of witnesses. The evidence was essentially reduced to written exhibits, now found in the record (R. 220-263). The basic figures for the period 1907-1937 were supplied by the New Haven Railroad; and from November 16, 1937 (date of surrender of the properties to the landlord) to December 31, 1938, were taken from the operating records of Respondent. The problem was to find the rental value of the landlord's property.

The District Court held: that the operating history of the property showing the operating revenues back to 1907 (R. 271) was inadequate to support "an assessment for the unexpired term of 969 years, which is the only term with which we are here concerned" (R. 277). "When the Supreme Court emphasized the high standard of proof required and the inherent difficulty of complying therewith, it contemplated that non-compliance should result in disallowance, not in a modification of standard and measure" (R. 278). "There is no basis for the assumption implicit in claimant's position that a past experience of even thirty years of earnings has a forecasting value for a period of over 900 years" (R. 279).

And so the whole claim for damages for rejection of the lease was disallowed—even the $1,263,412.92 allowed on the former trial was revoked (R. 287).

Respondent appealed to the Circuit Court of Appeals, which reversed (109 Fed. (2nd) 568), holding it was error to rule that the inability of Respondent to prove

damages over the entire 969 years sufficed to defeat the claim (*supra*, p. 571).

The opinion of the Court of Appeals succinctly sets forth what the Court did. In order to find a "normal" year, and thus a "normal" operating income which would indicate a true rental value, an experience period of 14 years was selected, for reasons which are stated. The rental value being thus ascertained (R. 240), the computations of damages for all future periods up to forty years were already worked out in the exhibits (R. 236-239). The selection of the experience period and the length of the forecast were judicial operations, and the only ones required; the exhibits at once gave the result in dollars. The credibility of no witness was involved; no conflict of evidence required to be resolved; in the circumstances the Court of Appeals wrote the answer itself, instead of sending the case back to the District Court for a third trial.

Argument.

No novel rule of damages (e.g. an all-or-nothing requirement) was laid down by the Supreme Court for this case. On the contrary, the Court said, "the usual rules as to the measure of damages" shall apply.

Connecticut Ry. & Lighting Co. v. *Palmer*, 305 U. S. 493, 505.

There being no doubt that the usual rules have here been applied, the granting of a writ of certiorari will not

be warranted merely to review the evidence or inferences drawn from it.

General Talking Pictures Co. v. *Western Electric Co.*, 304 U. S. 175, 178.

Conclusion.

The petition should be denied.

Respectfully submitted,

GEORGE W. MARTIN,
Counsel for Respondent,
48 Wall Street,
New York.

April 8, 1940.